No. 15360

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

MAUD L. ELFER,

Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

The Appellee contends the decision of the District Court was correct in all respects and should be affirmed by this Court. The Appellant has separately stated the questions to be determined by this Court and Appellee

will supply her authorities and arguments to each question raised.

ARGUMENT AND AUTHORITIES

I.

Appellant contends the District Court erred in holding the alleged erroneous payments were made solely to the marital community of Defendant and her former husband and not to Defendant separately. The Appellant is frank to admit that it has been unsuccessful in finding legal authority for the position taken and proceeds to argue its position upon a "logical basis".

a. The Appellant proceeds upon the false assumption that: "Family allowances are a gift or a gratuity" as stated on page 7 of its brief.

In support of its position, Appellant refers (on page 9) to Internal Revenue Cumulative Bulletin 1942-2, page 53, stating that income tax is not imposed upon the government's contribution to the family allowance, considering it "in the nature of a gift by the Government". The Internal Revenue Department has also declared to be free from income tax the following: veteran's bonus; cash in lieu of living quarters; value of living quarters or allowances in lieu thereof to a chaplain; commutation of quarters; disability payments; gratuity pay; moving family and household effects on change of official station for permanent duty, with reimbursement by Government;

mustering-out payments; National Service Life Insurance dividends; subsistence; uniform allowance. The mere exemption from income tax of payments made to a serviceman or his dependents, does not by that act make the benefits in the "nature of a gift" where they are furnished as an incident to the services previously or presently rendered by the serviceman to his Government.

The land grant case of *Hatch* v. *Ferguson* (D.C. - Wash., 1895), 68 Fed. 43, cited on page 9 of Appellant's brief, has no connection with family allowances and does not support Appellant's position. The Court's attention is directed to *Kirchner* v. *Murray,* 54 F. 617, affirmed 5 Cir., 60 F. 48, which holds, in substance, that land given to volunteers in consideration of entering military service of Texas in her war of independence was held community property and was not a donation for services performed but was part consideration for such services.

The Texas decision in the case of *Johnson* v. *Johnson,* 23 S. W. 1022 (1893), involves a serviceman's pension, and has been cited by the Appellant to support its position. This decision, however, is based upon a Texas statute defining the term "pension" in *32 Tex. Jur., p. 769,* as follows:

> "A regular allowance paid to an individual by a government in consideration or recognition of services rendered or of loss or damage sustained in the

public service. Grant . . . does not impose a contractural obligation; the allowance is gratuitous and in its continuance the pensioner has no vested right."

The Appellee acknowledges that a Washington statute declares property of a married woman acquired by gift shall be her separate property. No authority whatsoever has been cited by the Appellant that a family allowance or allowance to dependents under either of the cited acts of 1942 was "in the nature of a gift".

In *Hokenson* v. *Hokenson,* 23 Wn. (2d) 908, 162 P. 2d 592 (1945), the wife, like the Appellee herein, received $50.00 monthly as a result of her husband's service in the navy and which was applied to her personal use. In that case the Court made the following observation:

"This money was undoubtedly community property."

The only case, the Appellee has found, in which the Court has been asked to determine squarely whether a family allowance was separate or community property, is *Sterrett* v. *Sterrett,* 228 S. W. 2d 341 (1950), a Texas decision. The Texas District Court entered a divorce decree in favor of the appellant wife finding that certain real estate was purchased by her with moneys from an allotment made out by the United States Government to the wife who was a Class A dependent under the Servicemen's

Dependents Allowance Act of 1942, as amended. This Court held that the real estate so acquired was community property. The wife appealed from this decision, arguing that the money, with which the real estate was purchased and improvements built, was that received by her from the Government under said Act and, therefore, her separate property. The Appellate Court stated that her contention placed before the Court the question of whether a governmental allotment under said Act to a serviceman's wife is her separate property or community property.

The wife in that case, as does the Appellant here, relied mainly upon the theory that the government allotment sent to her by her federal government *was a gift,* and therefore under the Texas community property statute, became her separate property. Various sections of the Servicemen's Dependents Allowance Act of 1942 were cited to the Court in support of her position.

The husband appellee cited in the *Sterrett* case as authority for his position:

> "Sherburne's Adm'r v. U. S., 16 Ct. Cl. 491, thus: "Pay is a fixed and direct amount given by law to persons in military service, in consideration of and as compensation for their personal service. Allowances, as they are now called, or emoluments, as they were formerly termed, are indirect or contingent remun-

eration, which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes in the nature of reimbursement. Both pay and allowances are compensation for services while in service . . ."

The husband further cited *Kipping* v. *Kipping*, (Tenn.) 209 S. W. 2d 27, 28 (1948), in support of his position. The Court there stated that the right of a soldier to dependents' allowance was an integral part of his contract of enlistment. It was an inducement for enlistment, which in that case, as well as in the case at bar, was voluntary, and as an incident of the contract was doubtless enforceable at law. In that case the Court further stated that when the serviceman sacrificed his civilian earning capacity by enlisting in the Army, it seemed reasonable that his military earning capacity was substituted. The Congressional purpose in passing the Serviceman's Dependents Allowance Act of 1942 was to enable the enlisted man while serving in the Armed Forces to meet, to some extent, his common law obligation of support and maintenance of dependents.

The Court of Civil Appeals of Texas in the *Sterrett* case concluded: *"We find also the amount of money in question was a part of appellee's compensation for services rendered to his government in time of war and therefore same is COMMUNITY PROPERTY under our state laws."*

b. Appellant next states a broad general rule concerning overpayment by mistake. Appellee does not agree that any repayment should be made by her.

c. Appellant abruptly concludes that the dependent has an implied obligation to repay, irrespective of the separate or community status, as the party receiving the same. No authority is furnished to support the conclusion that "any obligation of the wife to repay is her separate obligation". In view of the authorities cited that family allowance payments are *community property,* then any obligation to repay could be only a *community obligation.*

d. Appellant next contends that if the Appellee receives the overpayment as the agent of the then marital community, she has a personal obligation to repay. A general declaration of the principles with which we are here concerned appears in 41 C. J. S., Husband and Wife, Sec. 518 (c) on page 1109, as follows:

> "A wife's capacity to bind herself or her property by contract has been held to be determined by the law of her domicile, and the character of a debt as separate or community by the law of the place where it arose."

This principle has been approved by the Supreme Court of Washington in *Meng* v. *Security State Bank of Woodland,* 16 Wn. (2nd) 215, 133 P. 2d 293 (1943).

Several Washington cases can be found showing the absence of personal responsibility of a wife for a community debt or obligation. In *McLean* v. *Burginger,* 100 Wash. 570, 171 Pac. 518 (1918), the Court was called upon to decide the responsibility for notes given for loans made to the husband for the benefit of the community. In holding that the notes were community obligations and that the wife had no personal responsibility thereunder, the Court stated the rule in this language:

> "As heretofore stated, the debts of the community are likewise the husband's debts. All debts contracted by him he is liable to pay, not only from the community estate, but also from his separate property, and is subject to be sued therefor both before and after the dissolution of the community. These debts are his debts, but are not ordinarily the debts of the wife, except in the sense that her interest in the community is burdened with the liability for their payment . . . *The separate estate of a wife by mere operation of law can never be made liable for community debts,* while both the community estate and the separate estate of the husband will be liable for any debt he may contract."

In the later case of *Yakima Plumbing Company* v. *Johnson,* 149 Wash. 257, 270 Pac. 829 (1928) the Court approved the reasoning in the *McLean* case and states as follows:

"In this state, it is well settled that the wife personally is not bound for the debts of her husband whether incurred in the conduct of a business in his own right or in the conduct of a business on behalf of the community. The husband in each instance because he contracted the debt, and the community property is liable in the latter instance because the debt is contracted in the conduct of a community business; but our cases are uniform in holding that the wife is not personally liable in either instance, *unless she has, by an independent promise of some sort, made herself so personally liable. McLean* v. *Burginger,* 100 Wash. 570, 171 Pac. 518 (1918), and the cases there cited."

The latter case answers the questions raised in the two cases cited on page 13 of Appellant's brief. In those cases as well as the two on page 14, the wife made a specific promise to pay or a specific assumption of the debt or obligation. The record is clear in this case that the Appellee under no circumstances has ever made an independent promise to pay or acknowledged an obligation to Appellant arising out of payment of family allowance.

On page 14 of its brief the Appellant strongly relies upon *Werker* v. *Knox,* 197 Wash. 453, 85 P. 2nd 1041 (1938), where judgment was entered against a wife *and* the marital community for a tort committed by the wife. The liability of a wife for her tort is specifically covered

by Washington statutory law. See 26.16.190 R. C. W. which reads as follows:

> "Liability for acts of wife. For all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in cases where he would be jointly responsible with her if the marriage did not exist."

The only overt act with which Appellee can be successfully charged, is that of receiving over the period of her husband's enlistment in the United States Navy, a family allowance of $50.00 monthly, and no more. No evidence has been submitted or charge made that she received any sums in excess of $50.00 monthly during this entire period of time. In fact it could be urged that if any over-payments were made during the subject period of time, they must have been made to then husband of the Appellee as part of the pay and allowances specifically drawn by him.

II.

Appellant next contends that the District Court erred in holding that payments made in error and in violation of law were made as compensation for military services and constituted community income. Again, this is strictly a conclusion and has no authoritative basis. In fact the authorities listed on page 16 of Appellant's brief (except

for the *Hokenson* case) were first called to the attention of the trial court by the Appellee, and constituted authority upon which the Court's decision rested. At no time has it been claimed or established that Appellee was not entitled to the monthly family allowance of $50.00. This action apparently arose (as stated in the Appellant's Statement of the Case on page 6) because the then-husband never exercised his option to waive the quarters allowance pertaining to his grade and continued to allow his dependent to draw family allowance. Appellant further acknowledges that the then-husband of Appellee drew (for all that the record reveals) his full pay and quarters allowance during the entire period of time. It seems obvious that the Appellant having permitted an apparent overpayment, should have caused both recipients of pay and allowances to be joined as parties defendants.

III.

Appellant finally contends the District Court erred in holding that KENNETH SCHLAFER was a necessary and indispensable party to the action and in dismissing the action for failure to join him.

SCHLAFER was without question an indispensable and necessary party to the action for the reason that he and the Appellee were husband and wife at the time of the alleged overpayment. They thereby constituted a marital community under the laws of the State of Washington,

and the husband by said law has the management and control of community personal property. See Section 26.16.030 R.C.W.

The partition case cited on page 17 of Appellant's brief has no relationship to the marital community or the obligation of the wife therein.

Appellant's reference to *Greenleaf* v. *Safeway Trails, Inc.* (C. A. - 2d; 1944), 140 F. 2d 889, on page 18 of its brief, involves a situation where two corporations promised to execute a promissory note to the Plaintiffs and in the action brought thereon one was not joined as a party defendant. The Court specifically ruled: "But one of several joint obligators is not an indispensable party to an action against the other", and "complete relief can be afforded between the plaintiff and Safeway without the presence of Eastern as a party defendant". A further examination of the *Greenleaf* case indicates the Court took into consideration a New York statute which permits a joint obligator to be sued separately.

In *Dolan* v. *Baldridge,* 165 Wash. 69, 4 P. 2d 871 (1931), the Court ruled as follows:

> "The complaint alleges that the respondents are husband and wife; that Mrs. Dolan was injured as the result of the negligent operation of an automobile owned and driven by the respondents. Clearly, the action is against the respondents as a marital com-

munity. The liability, if any, for the tort of which appellant's complain, would be a community obligation. That being so, the husband was a necessary party defendant, without whom the action could not proceed, *as the action could not be maintained against the wife alone for a community obligation. It was essential, therefore, to the maintenance of the action against the marital community that either personal service or substituted service of summons be made upon the husband.*"

The District Court was therefore entirely correct in its determination that the husband was an indispensable party to this action. The Federal Rule of Civil Procedure of 19 (b) states as follows:

"Effect of Failure to Join. *When persons who are not indispensable,* but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both services of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired

only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

The Court found (R. 9) that KENNETH SCHLAFER still resided within the jurisdiction of the Court. The Appellee's answer (R. 6) specifically sets forth her position that any claimed indebtedness must be one as against the then marital community and was not the personal debt of the Appellee. In her answer she specifically called to the attention of the Appellant and the Court, nine months prior to trial, that KENNETH H. SCHLAFER was alive, a citizen and resident of the district, subject to the jurisdiction of the court, and could be made a party without depriving the District Court of jurisdiction and has not been made a party. No request was ever made of the Court by the Appellant that SCHLAFER be joined as an additional party defendant, but Appellant has at all times maintained its position to sue only this Appellee.

CONCLUSIONS

The Appellee respectfully submits that the case has been properly decided by the District Court and should be affirmed.

Respectfully submitted,

RICHARD F. SCHACHT

Attorney for Appellee